IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-860

HARRY WOLKIND,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF HENRICO COUNTY, VIRGINIA

JOHN R. ALDERMAN
Assistant Commonwealth's Attorney
County of Henrico
P. O. Box 27032
Richmond, Virginia 23273
Counsel for Respondent.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-860

HARRY WOLKIND,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF HENRICO COUNTY, VIRGINIA

QUESTION PRESENTED

Whether a person's Fourth Amendment rights are violated when a dog trained to detect drugs and absolute in its reliability, signals to police that drugs are present in that person's private train compartment, and the police thereafter search the person's compartment without a search warrant.

STATEMENT OF FACTS

On August 2, 1977, Petitioner was tried and convicted of possession of marijuana with intent to distribute in violation

of *Va. Code Ann.* § 18.2-248, and of possession of cocaine in violation of *Va. Code Ann.* § 18.2-250. Petitioner had entered pleas of not guilty to each indictment and was tried by the Henrico County Circuit Court sitting without a jury.

Respondent, the Commonwealth of Virginia, introduced evidence at trial that petitioner had been a passenger on an Amtrak passenger train which stopped in Henrico County on December 11, 1976. On that day, several police officers, together with an Amtrak Police Investigator, boarded the particular rail car on which petitioner had a private compartment. The officers had with them a dog which had been trained to sniff and alert on certain illicit controlled substances. The dog was taken through the common corridor of the rail car in which petitioner's compartment was located. The dog stopped and "alerted" on petitioner's compartment indicating the presence of drugs within. The officers knocked on the door of the compartment; petitioner answered; the officers entered the compartment with the dog. The dog alerted on two pieces of luggage, those pieces of luggage were seized, and petitioner was arrested. Later, pursuant to a search warrant, the luggage was opened and marijuana and cocaine were found inside.

REASONS FOR DENYING THE WRIT

I

DID THE ACTIVITIES OF THE POLICE OFFICERS AND THE DOG IN THE RAIL CORRIDOR CONSTITUTE A SEARCH?

Petitioner contends that the activities of the police in this case raise issues essentially analogous to those decided in *Katz v. United States,* 389 U.S. 347 (1967). In *Katz,* a telephone conversation from a public phone booth was intercepted by electronic means. Petitioner appears to suggest that the dog, intercepting the odor of drugs in the corridor, caused a similar intrusion upon petitioner's Fourth Amendment rights.

Respondent submits, however, that the analogy to *Katz* is fallacious in that in the present case, the police did nothing in the corridor which infringed or intruded in any manner upon the privacy of petitioner's activities. Petitioner in this case could assert no legitimate privacy interest in an odor which permeated the air in the common corridor.

Respondent submits that the activity of the police in the corridor was not a search; alternatively, if the activity in the corridor is assumed to have been a search, it was a search for which petitioner has no standing to object; and finally, the "search" in the corridor, if such it was, was a minimal, reasonable intrusion and not violative of petitioner's Fourth Amendment rights.

Testimony at trial revealed that petitioner was occupying a compartment in a rail car. He possessed a ticket entitling him to use that compartment to his destination. (Tr. 96-100). The corridor adjoining the compartment was a common area open to all aboard the train. As such, no search occurred in the corridor because petitioner was making no effort in the corridor itself to prevent discovery of anything; moreover, since the corridor was an area open to anyone legitimately on the train, petitioner could not realistically or legitimately expect any privacy there.

If, for the sake of argument, the activity of the police in the corridor amounted to a search, respondent submits that it was a search for which petitioner had no standing to object. An individual is entitled to attack the validity of a search and seizure only if (1) he owns or has the right of possession of the place searched, (2) he owns or has the right of possession of the property seized, or (3) he was

legitimately on the premises when the search occurred. *See, e.g., Brown v. United States,* 411 U.S. 223 (1973); *Chesson v. Commonwealth,* 216 Va. 827 (1976); *but see Rakas v. Illinois,* ..... U.S. ..... (5 Dec. 1975). In this case, although petitioner had the right to use the corridor, he neither owned nor had a right to possess the corridor; rather, he only had a right to occupy the compartment. Further, petitioner cannot say that he owned or had the right to possess the odor which the dog perceived. Such a claim would be akin to a claim that he owned the entire atmosphere wherever the odor might be detected; such a claim would be, on its face, patently frivolous. That the smell exited the luggage and drifted out of petitioner's compartment into the corridor was unavoidable. Respondent submits that no individual can realistically or legitimately possess an odor. Finally, since petitioner was not in the corridor, he cannot object to any search which may have occurred there.

In any event, the activities of the officers were reasonable, and constituted, at most, a minimal intrusion into privacy which in and of itself was inoffensive. Courts around the country have all but unanimously held that no constitutional rights are violated by such activity.[1]

[1] See, e.g., *United States v. Venema,* 563 F.2d 1003 (10th Cir. 1977); *United States v. Meyer,* 536 F.2d 963 (1st Cir. 1976); *United States v. Solis,* 393 F. Supp. 325 (C.D. Cal. 1975), rev'd., 536 F.2d 880 (9th Cir. 1976); *United States v. Bronstein,* 521 F.2d 459 (2d Cir. 1975), cert den., 424 U.S. 918 (1976); *State v. Martinez,* 26 Ariz. App. 210, 547 P.2d 62 (1976); *People v. Campbell,* 67 Ill. 2d 308, 367 N.E. 2d 949 (1977); cert. den. sub nom., *Myers v. Illinois,* 435 U. S. 942 (1978); *State v. Kaiser,* 91 N. M. 611, 577 P.2d 1257 (1978). But, c.f., *People v. Evans,* 65 Cal. App. 3d 924, 134 Cal. Rptr. 436 (1977); *People v. Williams,* 51 Cal. App. 3d 346, 124 Cal. Rptr. 253 (1975).

II

WAS THE SEARCH OF THE COMPARTMENT LEGITIMATE AND REASONABLE IN THE ABSENCE OF A SEARCH WARRANT?

Respondent submits that there was ample probable cause for the police, acting without a search warrant, to inquire and search petitioner's compartment after the police dog had "alerted" on that compartment.

Testimony at trial described the dog used by the police as having a sense of smell 100,000 times keener than a human's sense of smell. The dog also "alerted" only on certain controlled substances, i.e., marijuana, hashish, cocaine, heroin and amphetamines. (Tr. 128). Moreover, the dog *never* reacted falsely and *never* made mistakes in training or when actually on the job. (Tr. 137, 142). Respondent submits that the dog's reaction at the door of petitioner's compartment, in and of inself, was sufficient to give the police probable cause to search the compartment.

As will be discussed, *infra,* respondent submits that it was unnecessary for the police to obtain a search warrant prior to entering petitioner's compartment. At this juncture, respondent submits that probable cause to justify a search of petitioner's compartment existed. In *Aguilar v. Texas,* 378 U.S. 108 (1964), this Court held that a search is justified if based upon probable cause; probable cause amounts to information which is detailed enough for a judicial officer to believe that contraband is present at a location to be searched.

Respondent submits that the information available to the officers in the corridor was sufficient and detailed enough to give the police probable cause to search petitioner's compartment. The dog "alerted" at the door to petitioner's compartment, indicating to the officers that drugs were inside. (Tr. 134). The significance of the dog's "alert" was

explained by the dog's handler, another police officer; he explained that the dog *never* reacted to or "alerted" on anything which turned out not to be controlled drugs. (Tr. 137, 142). Additionally, the dog's sense of smell was at least 100,000 times more sensitive than a human's sense of smell. (Tr. 141). Thus, when the dog "alerted" at the door to petitioner's compartment, the police officers had information sufficient to give them a certainty that drugs were present inside.

Respondent submits that the actions of the dog and the information imparted thereby to the officers is analagous to the situation where an informant provides information as a basis for a search. *Aguilar, supra,* held that police could rely on an informant to justify a search provided that the informant gave information detailed enough for a judicial officer to find probable cause to believe that contraband is present at a given location; moreover, the judicial officer must have sufficient information to find that the informant is reliable.

The *Aguilar* standard was applied in the case of *United States v. Gazard-Colon,* 419 F.2d 120 (2d Cir. 1969). There, an informant gave police information that the defendant would be at a certain location, at an approximate time, would be in possession of heroin and would conceal it in a certain manner. The informant further gave information that he had been with the defendant shortly before the arrest, saw the defendant in possession of heroin and observed the defendant distribute the heroin. Finally, the informant had given police six tips in preceding months which led to three arrests and the seizure of some heroin. The Court of Appeals in *Gazard-Colon* held that this was more than enough information from which to find probable cause to believe that contraband would be present when the defendant was stopped, arrested and searched. Moreover, the

court found sufficient grounds to believe the informant to be reliable.

In the present case, respondent submits that the dog must be regarded as reliable since its sense of smell was at least 100,000 times keener than a human's sense, and the dog *never* reacted falsely and *never* made mistakes. Contrast this reliability to that of the informant in *Gazard-Colon* where the court knew that the informant gave incorrect information at least part of the time. It is submitted that the inescapable conclusion is that the dog was reliable as an "informant".

The second test of *Aguilar* requires a showing that the information imparted by the dog was sufficient to establish probable cause to believe that contraband was present in petitioner's compartment. Once again, the dog never reacted falsely and never made mistakes. On December 11, 1976, the dog reacted positively and alerted at the door of petitioner's compartment, indicating to the officers that drugs were present inside. Under these circumstances, respondent submits that the inescapable conclusion to be derived from the dog's actions is that there was probable cause to believe that drugs were present in the compartment. Thus, the two-fold test of Aguilar was met and the officers were justified in entering the compartment, searching and seizing two pieces of luggage.

Applying the "common sense and realistic" standard by which probable cause is to be considered, *United States v. Ventresca,* 380 U.S. 102 (1965), respondent submits that there was ample probable cause to justify the actions of the police in entering and searching petitioner's compartment.

Petitioner notes that the police used a "profile" to identify him as a suspect in this case. As indicated at trial, the profile was used by the police only as a preliminary step to utilizing the dog. (Tr. 150). Respondent concedes that the profile,

in and of itself, does not amount to probable cause to search petitioner's compartment. It only served to arouse the suspicion of the police leading them to investigate further. When the suspicions of police are aroused, logic dictates that investigation should be made. *See generally, Terry v. Ohio,* 392 U.S. 1 (1968), *Lawson v. Commonwealth,* 217 Va. 354 (1976); *Hollis v. Commonwealth,* 216 Va. 874 (1976). The only conceivable use of the profile was to enable the police to enter the rail car containing petitioner's compartment. Testimony at trial was that the dog was not led to petitioner's compartment; the dog was simply commanded to "find the drugs" and led the officers to the compartment. (Tr. 149-150). Use of the profile certainly cannot be imputed to the dog. Thus, use of the profile did not contribute to probable cause.

For the foregoing reasons, respondent submits that the police had probable cause to search petitioner's compartment.

III

WAS A SEARCH WARRANT NECESSARY IN ORDER TO SEARCH PETITIONER'S COMPARTMENT?

Evidence at trial indicated that petitioner was a passenger on a train enroute from Florida to Delaware. (Tr. 68). As such, the train was engaged in interstate commerce. At the time of the search, the train was stopped at a station in Henrico County for an approximate fifteen minute period. (Tr. 106). Based upon these circumstances, respondent submits that there were exigent circumstances justifying the search of petitioner's compartment without a search warrant.

Respondent first notes that the compartment was on a train stopped for only a short time in Henrico County. As such, because of that mobility, exigent circumstances such as those present in *Chambers v. Maroney,* 399 U.S. 42 (1970) govern. Had the police allowed the train to continue,

there would be ample opportunity for disposal of the drugs. Moreover, since the officers lacked probable cause to believe that drugs were in petitioner's compartment before they actually boarded the train with the dog, they could not have obtained a search warrant prior to that time. Under these circumstances, respondent submits that it was proper to search the compartment without a warrant. *Chambers, supra; Westcott v. Commonwealth,* 216 Va. 123 (1975).

Petitioner has asserted previously that the officers could have held the train in order to obtain a search warrant for the compartment. Testimony at trial was that trains have been held up for emergencies such as illness, (Tr. 109), but the Amtrak investigator in this case indicated that he had never held trains, that he had no control over them and that he had no authority to stop or hold a train. (Tr. 107, 108). For two reasons, such an assertion is meritless. First of all, "... the relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." *Cooper v. State of California,* 386 U.S. 58 (1967). Moreover, even if petitioner's compartment was kept under surveillance, such could not prevent destruction or disposal of evidence; proceeding with the surveillance, to follow the argument, would require the officers to wait outside the compartment.

Finally, testimony at trial indicated that after two pieces of luggage were removed from petitioner's compartment, they were thereafter opened and searched pursuant to a search warrant. (Tr. 171). During testimony about this matter, petitioner's counsel made no objection to the search warrant or the search of the luggage pursuant to the warrant. Impliedly then, such amounts to a concession that the information supplied by the dog gave the officers probable cause, both to enter the compartment and search, and to seize and search the luggage.

For the foregoing reasons, respondent submits that no search warrant was necessary for the officers to enter petitioner's compartment and search and seize the luggage.

IV

DOES THE DECISION IN KATZ v. UNITED STATES PRECLUDE ANY SEARCH FOR CONTRABAND EVEN IF POLICE HAVE PROBABLE CAUSE TO SEARCH?

Petitioner generally challenges the use of the dog in this case, drawing a parallel between the interception of a conversation, at issue in *Katz v. United States,* 389 U.S. 347 (1967), and the dog's detection of the odor of drugs. This Court, in *Katz,* however, did not lay down a blanket rule of individual privacy prohibiting all intrusions by police. Rather, it was recognized that the information possessed by government agents in *Katz* could have been used to obtain a search warrant, under which the intercepted conversations would be properly admitted into evidence. Thus, because the conversations were intercepted without a warrant, and this Court could not ascertain how any exception to the warrant requirement could apply to those facts, the evidence had to be suppressed. A reading of *Katz* leaves one with the distinct impression, though it is not expressly so stated in the body of the opinion, that the government agents had available to them, prior to the time they intercepted the conversations, information with which to establish probable cause and obtain a search warrant. This important fact is what distinguishes the present case from *Katz,* for, as indicated above, the police did not have probable cause until the dog alerted at the door to petitioner's compartment. That distinction, coupled with the inexorable mobility of the rail car containing petitioner's compartment, plus the avenues within the compartment through which the

drugs could have been disposed, i.e., the toilet and wash basin (Tr. 105-106), emphasizes that this case squarely falls within the recognized exceptions to the warrant requirement. As discussed above, respondent relies principally on the mobility of the rail car and on the disposability of the drugs.

For the foregoing reasons, respondent submits that the decision of *Katz v. United States* is not a bar to the search which occurred in this case.

CONCLUSION

For the reasons stated, respondent requests that this Court deny this Petition for a Writ of Certiorari.

Respectfully submitted,

JOHN R. ALDERMAN
Assistant Commonwealth's Attorney
County of Henrico
P. O. Box 27032
Richmond, Virginia 23273
Counsel for Respondent.

CERTIFICATE OF SERVICE

I, John R. Alderman, Counsel for Respondent in above case have mailed by first class, three copies of Brief in Opposition, to Charles A. Horsky, Esquire; Eric A. Eisen, Esquire; John F. Mark, Esquire; Frederick W. Ford, Esquire, all of 888 16th Street, N.W., Washington, D. C. 20006, Counsel of Record for the Petitioner for Writ of Certiorari to the Circuit Court of Henrico County, Virginia.

JOHN R. ALDERMAN